

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 51709-s76D BY JAMES F. DONAGHY)	

* * * * *

The time period for filing exceptions or objections to the Proposal for Decision of January 2, 1985, has expired.

Chuck Brasen, Field Manager for the Kalispell Area Water Rights Bureau Field Office submitted comments. These were the only comments received.

Having given the matter due consideration, and being fully advised in the premises, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law of the Proposal, incorporating them herein by reference. The Department's response to Mr. Brasen's comments follows.

Mr. Brasen indicated confusion over the Applicant's actual intent and plan for use. The flow rate applied for apparently was tied solely to the hydropower generation, although a flow-through fish pond was specified as an additional use of the water, or at least, as a part of the hydropower project. The record in this matter supports the Finding as it now reads, but does not allow for clarification. That is, there is insufficient evidence on the record herein to support any further findings of fact regarding the specifics of the Applicant's proposal. Because of the disposition herein, no additional findings are necessary.

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Mr. Brasen also indicated that if insufficient evidence existed in this file to support Departmental findings on the statutory criteria for issuance of beneficial use permits, then "...I suggest the attached letter be attached to each 600 for informational purposes. I would also suggest that paragraph two of the attached become a part of written policy and at a minimum immediate verbal implementation."

This raises an issue of prospective application, appropriate for rulemaking procedures but not before the Department in the instant contested case. While the instant case stands as precedent for similarly situated permit applicants, no decision rendered herein can include a decision to implement any particular policy with regard to applicants not before the Department in this case. (See, In re Don Brown, Final Order, April 24, 1984.) Thus, the suggestion may be noted as meritorious, but cannot engender further action herein.

The Applicant has submitted no flow data for the water source from which he seeks to appropriate, nor has a complete description of the proposed appropriation been provided to the Department. The Applicant was given ample opportunity to provide this information to the Department, being informed in the Proposal the need for the data.

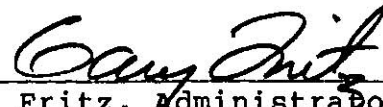
FINAL ORDER

Application for Beneficial Water Use Permit No. 51709-s76D by James F. Donaghy is hereby denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 2 day of April, 1985.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 8, 1984, she deposited in the United States mail, First class mail, an order by the Department on the Application by James F. Donaghy, Application No. 51709-s76D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. James F. Donaghy, Box K, Eureka, MT 59917
2. Kootenai National Forest, Larry Meshaw, P.O. Box AS, Libby, MT 59923
3. Montana Department of Fish, Wildlife and Parks, Larry G. Peterman, 1420 East 6th Avenue, Helena, MT 59620
4. Chuck Brasen, Manager, Water Rights Bureau Field Office, (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner. (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 51709-s76D BY JAMES F. DONAGHY)

* * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1983), and to the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA (1983), the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") contacted the parties to the above entitled matter to schedule a hearing herein. Larry Meshew, a representative of the Objector United States Department of Agriculture, Kootenai National Forest (hereafter, "Kootenai"), requested the scheduling be postponed to allow time for on-going settlement negotiations. In a subsequent telephone conversation with the Hearing Examiner, Mr. Meshew stated that a settlement had been reached and that therefore no hearing was necessary.

The following Proposal for Decision has therefore been prepared on the basis of the record herein, which consists solely of the files of the Department.

I. Statement of the Case

On January 17, 1983, the Applicant, James F. Donaghy applied for a beneficial water use permit to appropriate water from Therriault Creek for hydroelectric power generation, and,

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incidentally a flow through fish pond, non-consumptive uses. The Applicant seeks 3590.4 gallons per minute (hereafter, "gpm") or, 8 cubic-feet per second (hereafter, "cfs"), up to 5,790.4 acre-feet per year for use all year round. The proposed diversion point is in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 34, Township 36 North, Range 26 West, Lincoln County, Montana; the proposed place of use is in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 34, Township 36 North, Range 26 West for both the fish pond and the power plant. The off-stream capacities of the fish pond and a peaking storage pond are 3 acre feet each.

Kootenai timely filed an objection on the grounds that a diversion of 8 cfs would dewater Therriault Creek most of the year, preventing fish passage contrary to prior federal reserved water rights of the objector arising under the Multiple Use Sustained Yield Act of 1960, the National Environmental Policy Act of 1969, the Forest and Rangeland Renewable Resources Planning Act of 1974, and the National Forest Management Act of 1976.

The Montana Department of Fish, Wildlife and Parks (hereafter, "MDFWP") submitted a letter of concern, but did not formally object or request a hearing. MDFWP is concerned about the effect of dewatering the Creek on the fishery habitat therein.

Kootenai and the Applicant arrived at a stipulation and on the basis thereof, the Objector withdrew its request for a hearing on this matter. (See attached Exhibit "A").

Wherefore, based on the record herein, the Hearing Examiner hereby makes the following :

II. Findings of Fact

1. The instant Application was regularly filed with the Department on January 17, 1983.

2. The Applicant seeks to appropriate water from Therriault Creek for the purpose of hydroelectric power generation, and for an associated flow through fish pond. These purposes are of material benefit to the Applicant.

3 The Department has jurisdiction over the subject matter herein and the parties hereto.

4. The pertinent facts of the Application were published on July 14, 21, 1983 in the Tobacco Valley News, a newspaper of general circulation in the area of the source.

5. The source of supply for this Application is Therriault Creek, tributary to the Tobacco River. By means of a headgate and pipeline or ditch, the Applicant seeks to divert 3,590.4 gpm up to 5,790.4 acre-feet per year from Therriault Creek at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 36 North, Range 26 West, Lincoln County, Montana, for use in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 36 North, Range 26 West. Associated with the project are two 3 acre-feet ponds, one for a flow through fish pond and one for peak demand storage capacity.

6. There is no evidence in the record regarding the amount of water in Therriault Creek.

7. There is insufficient evidence on the record herein to make determinations regarding availability of unappropriated waters in the amount and during the time period the Applicant seeks to appropriate.

8. Because the proposed uses are substantially non-consumptive, the impacts of the proposed uses on the source of supply and the appropriative rights of other users thereof will occur only between the intake and outlet structures of the project.

9. Substantial credible evidence exists that the means of diversion, construction, and operation of the appropriative works will be adequate.

Wherefore, based on the foregoing, and on the files in the record herein, the Hearing Examiner hereby makes the following:

III. Conclusions of Law

1. The Department has jurisdiction over the subject matter herein and the parties hereto.

2. The Department gave proper notice of the Application, and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. The Department is required to issue the permit if the Applicant shows by substantial credible evidence that the following conditions exist:

(a) there are unappropriated waters in the source of supply:
(i) at times when the water can be put to the use proposed by the applicant,
(ii) throughout the period during which the applicant seeks to appropriate,
(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
(b) the water rights of a prior appropriator will not be adversely affected;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial one;
(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use is a beneficial use. § 85-2-102(2) MCA (1983); Application of Don Brown, Final Order, April 24, 1984.

5. There are no issued permits or planned uses or developments for which water has been reserved with which the proposed use will interfere.

6. It appears that, the uses being substantially non-consumptive, the water rights of prior appropriators will not be adversely affected. § 85-2-311(1)(b) MCA (1983).

7. The substantial credible evidence exists that the proposed means of diversion construction and operation of the appropriation works will be adequate. The project will be subject to special use permit or license conditions by the U.S. Forest Service. Further, the permit can be adequately conditioned to require adequacy in the appropriative works.

8. The Objector is the holder of unquantified prior federal reserved rights on the source of supply.

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9. The Objector and the Applicant have agreed that for protection of the Objector's prior rights, the Applicant must leave 2 cfs in the source of supply at all times. (See attached Exhibit "A").

10. The Applicant has shown by substantial credible evidence the existence of all applicable criteria except those relating to water availability. As an evidentiary matter, the burden of proof, i.e.: substantial credible evidence, could be met and a permit issued herein, if the Applicant were to submit some discharge records for the source of supply showing adequate flow therein. It appears that some such records exist, as the Objector's objection refers to existing District discharge records. Such submission should be made within the time period for exceptions hereto, and would allow the final decision to favor the Applicant.

Upon some showing of water availability, and a more complete description of the project, including point of diversion for the flow through fish pond and for the peak power storage pond, a permit may issue. Ultimately, because of pending necessary federal approvals, the quantity permitted herein is of less importance than in most cases. When the necessary approvals have been garnered, the Applicant will have a complete picture of the project and, upon final inspection and issuance of a Certificate of Water Right, the quantity and flow rate may be more precisely granted.

Conversely, if insufficient water exists for a viable project, it will not receive the requisite blessing of the Federal Energy Regulatory Commission, and will not be built. See, 16 U.S.C. §§ 791(a)-825(r) (projects to be in public interest.) Should this occur, any permit issued herein would be revoked, as the beneficial use for which the permit was granted would no longer be served. Beneficial use is the base, limit and measure of the appropriative right. Bailey v. Tintinger, 45 Mont. 154, 122 P. 515 (1912); Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933); Oscar Hill v. Merrimac Cattle Co., 41 St. Rep. 1504 (1984). If it becomes impossible to perfect the inchoate right of the provisional permit, the permit must be revoked. § 85-2-314 MCA (1983).

The Objector will be allowed a twenty day period for response to Applicant's submission.

Wherefore, based on the foregoing, the Hearing Examiner hereby makes the following Proposed:

ORDER

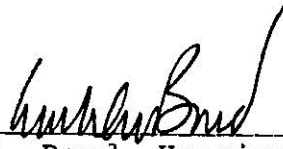
That Application for Beneficial Water Use Permit No. 51709-s76D by James F. Donaghy be denied without prejudice to the Applicant to make a showing of water availability and to submit further clarification of the proposed project, prior to issuance of the final order herein.

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The Applicant must submit his information simultaneously to the Hearing Examiner and to the Objector herein. The Objector will then have 20 days from receipt of Applicant's submission to submit to the Hearing Examiner a response thereto. Upon termination of the time period for Objector's response, the Department will issue a final order herein.

DONE this 2nd day of January, 1985.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

CASE #

51709

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January 3, 1985, she deposited in the United States mail, Certified mail, an order by the Department on the Application by James F. Donaghy, Application No. 51709-s76D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. James F. Donaghy, Box K, Eureka, MT 59917
2. Kootenai National Forest, Larry Meshaw, P.O. Box AS, Libby, MT 59923
3. Montana Department of Fish, Wildlife and Parks, Larry G. Peterman, 1420 East 6th Avenue, Helena, MT 59620
4. Chuck Brasen, Manager, Water Rights Bureau Field Office, (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 3rd day of January, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr
Notary Public for the State of Montana
Residing at Montana City Montana
My Commission expires 3-1-85

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